

AMENDED IN ASSEMBLY JUNE 26, 2006

AMENDED IN ASSEMBLY JUNE 15, 2006

AMENDED IN SENATE APRIL 24, 2006

AMENDED IN SENATE APRIL 18, 2006

AMENDED IN SENATE MARCH 13, 2006

## **SENATE BILL**

**No. 1272**

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**Introduced by Senator Bowen  
(Principal coauthor: Senator Alquist)**

February 9, 2006

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An act to add Section 4800.5 to the Probate Code, relating to advance health care directives.

### LEGISLATIVE COUNSEL'S DIGEST

SB 1272, as amended, Bowen. Advance health care directives.

Existing law establishes the Advance Health Care Directive Registry allowing individuals to register a written advance health care directive with the Secretary of State. The information in the registry is accessible by specified entities, upon request.

This bill would require the Secretary of State to establish an electronic recording delivery system, as defined, to provide access to advance health care directive records to health care providers and the individuals to whom the records pertain or an authorized person, as specified. The bill would require the system to be periodically audited by a computer security auditor, and would require any person with secure access to the system to be fingerprinted and to undergo a criminal background check, to be conducted in conjunction with the Department of Justice. *The bill would require that the Advance Health*

*Care Directive Registry Internet Web site and “Donate Life,” the California Organ and Tissue Donor Registry Internet Web site, each have a direct link on its home page to the other’s Internet Web site. This bill would also permit the Advance Health Care Directive Registry Internet Web site and the Internet Web site of a repository of electronic advance health care directives to each have a direct link on its home page to the other’s Internet Web site, upon request of the repository. The bill would require the Secretary of State to report to the Legislature with regard to the system by June 30, 2011.*

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 4800.5 is added to the Probate Code, to  
2 read:  
3     4800.5. (a) For the purposes of this section, the following  
4 definitions shall apply:  
5     (1) “Computer security auditor” means computer security  
6 personnel hired to perform an independent audit of the electronic  
7 recording delivery system. The computer security auditor shall be  
8 independent of the Secretary of State’s office and shall not be the  
9 same contractor hired to establish electronic registration in, or  
10 access to, the state Advance Health Care Directive Registry.  
11     (2) “Digital electronic record” means a record containing  
12 information that is created, generated, sent, communicated,  
13 received, or stored by electronic means, but not created in  
14 original paper form.  
15     (3) “Digitized electronic record” means a scanned image of  
16 the original paper document.  
17     (4) “Electronic recording delivery system” means a system  
18 that delivers digitized or digital electronic advance health care  
19 directive records for registration in the Advance Health Care  
20 Directive Registry, and that returns those records to the party  
21 requesting registration.  
22     (5) “Security testing” means an independent security audit by  
23 a computer security auditor, including, but not limited to,  
24 attempts to penetrate an electronic recording delivery system for  
25 the purpose of testing the security of that system.

1 (6) “Source code” means a program or set of programs,  
2 readable and maintainable by any person, that is translated or  
3 interpreted into a form that the electronic recording delivery  
4 system can execute.

5 (b) The Secretary of State shall establish an electronic  
6 recording delivery system for registration in the Advance Health  
7 Care Directive Registry.

8 (c) The Secretary of State shall establish a system, pursuant to  
9 this section, for providing health care providers, who attest that  
10 they need access for health care purposes, electronic access to  
11 “read-only” copies of digitized or digital electronic advance  
12 health care directive records in the Advance Health Care  
13 Directive Registry upon request. The system shall also provide  
14 access to the individual to whom the digitized or digital  
15 electronic advance health care directive records pertain or to any  
16 person authorized to make decisions for that individual. The  
17 system shall have an auditable log of that access.

18 (d) The Secretary of State may terminate or suspend access to  
19 the registry for any good faith reason, including, but not limited  
20 to, a determination by the Secretary of State that termination or  
21 suspension is necessary to protect the public interest, to protect  
22 the integrity of public records, or to protect individuals from  
23 harm. The Secretary of State may also terminate or suspend  
24 access to a system if a party commits a substantive breach of the  
25 requirements of this section, or the regulations adopted pursuant  
26 to this part.

27 ~~(e) Advance health care directives that meet all other~~  
28 ~~requirements pursuant to this division, which have been~~  
29 ~~electronically signed, shall be valid if the requirements in Section~~  
30 ~~16.5 of the Government Code and Chapter 10 (commencing with~~  
31 ~~Section 22000) of Division 7 of Title 2 of the California Code of~~  
32 ~~Regulations are met. An advance health care directive that meets~~  
33 ~~the requirements of Section 4673 and this division shall not be~~  
34 ~~held to be unenforceable because it was not held in the registry.~~

35 (f) If a signature is required to be accompanied by a notary’s  
36 seal or stamp, that requirement is satisfied, if, in addition to  
37 meeting the requirements of ~~Section 16.5 of the Government~~  
38 ~~Code and Chapter 10 (commencing with Section 22000) of~~  
39 ~~Division 7 of Title 2 of the California Code of Regulations, the~~

1 *subdivision (e), the* electronic signature of the notary contains all  
2 of the following:

3 (1) The name of the notary.

4 (2) The words “Notary Public.”

5 (3) The name of the county where the bond and oath of office  
6 of the notary are filed.

7 (4) The sequential identification number assigned to the  
8 notary, if any.

9 (5) The sequential identification number assigned to the  
10 manufacturer or vendor of the notary’s physical or electronic  
11 seal, if any.

12 (g) Before the electronic recording delivery system may  
13 become operational, the Secretary of State shall conduct a  
14 computer security audit to confirm that the system is secure and  
15 that the proposed operating procedures are sufficient to assure the  
16 continuing security and lawful operation of that system. The  
17 Secretary of State shall establish regular computer security audits  
18 after the system goes into operation.

19 (h) The Secretary of State shall approve software and other  
20 services for the electronic recording delivery system pursuant to  
21 regulations adopted as described in this section.

22 (i) The Secretary of State shall, in consultation with interested  
23 parties, adopt regulations for the review, approval, and oversight  
24 of the electronic recording delivery system. Regulations shall be  
25 adopted pursuant to the Administrative Procedure Act (Chapter  
26 3.5 (commencing with Section 11340) of Part 1 of Division 3 of  
27 Title 2 of the Government Code). The regulations shall comply  
28 with Section 12168.7 of the Government Code.

29 (j) The regulations adopted pursuant to this section may  
30 include, but need not be limited to, any of the following:

31 (1) Establishment of baseline technological and procedural  
32 specifications for electronic recording delivery systems.

33 (2) Requirements for security, *privacy*, capacity, reliability,  
34 and uniformity.

35 (3) Requirements as to the nature and frequency of computer  
36 security audits.

37 (4) A statement of a detailed and uniform definition of the  
38 term “source code” consistent with this section.

1 (5) Requirements to ensure that substantive modifications to  
2 the operating system, compilers, related software, or source code  
3 are approved by the Secretary of State.

4 (6) Requirements for fingerprinting and criminal records  
5 checks required by this section, including a list of employment  
6 positions or classifications subject to criminal records checks  
7 under this section.

8 (7) Requirements for uniform index information that shall be  
9 included in every digitized or digital electronic record.

10 (8) Requirements for protecting proprietary information,  
11 accessed in an audit conducted pursuant to this section, from  
12 public disclosure.

13 (k) The Secretary of State may promulgate any other  
14 regulations necessary to fulfill his or her obligations under this  
15 part.

16 (l) The Secretary of State shall approve computer security  
17 auditors on the basis of significant experience in the evaluation  
18 and analysis of Internet security design, the conduct of security  
19 testing procedures, and specific experience performing Internet  
20 penetration studies.

21 (m) The electronic recording delivery system shall be audited,  
22 at least once during the first year of operation and periodically  
23 thereafter, as set forth in regulation by a computer security  
24 auditor. The computer security auditor shall conduct security  
25 testing of the electronic recording delivery system. The reports of  
26 the computer security auditor shall include, but not be limited to,  
27 all of the following considerations:

28 (1) Safety and security of the system, including the  
29 vulnerability of the electronic recording delivery system to fraud  
30 or penetration.

31 (2) Results of testing of the system's protections against fraud  
32 or intrusion, including security testing and penetration studies.

33 (3) Recommendations for any additional precautions needed to  
34 ensure that the system is secure.

35 (n) A computer security auditor shall have access to any aspect  
36 of an electronic recording delivery system, in any form  
37 requested. Computer security auditor access shall include, but not  
38 be limited to, permission for a thorough examination of source  
39 code and the associated approved escrow facility, and necessary

1 authorization and assistance for a penetration study of that  
2 system.

3 (o) If a computer security auditor reasonably believes that an  
4 electronic recording delivery system is vulnerable to fraud or  
5 intrusion, the Secretary of State shall be immediately notified.  
6 The Secretary of State shall immediately take the necessary steps  
7 to guard against any compromise of the electronic recording  
8 delivery system.

9 (p) No person shall be a computer security auditor or be  
10 granted secure access to the electronic recording delivery system  
11 if he or she has been convicted of a felony, has been convicted of  
12 a misdemeanor related to theft, fraud, or a crime of moral  
13 turpitude, or if he or she has pending criminal charges for any of  
14 these crimes. A plea of guilty or no contest, a verdict resulting in  
15 conviction, or the forfeiture of bail, shall be a conviction within  
16 the meaning of this section, irrespective of a subsequent order  
17 under Section 1203.4 of the Penal Code.

18 (q) All persons entrusted with secure access to the electronic  
19 recording delivery system shall submit fingerprints to the  
20 Secretary of State for a criminal records check according to  
21 regulations adopted pursuant to this section.

22 (r) (1) The Secretary of State shall submit to the Department  
23 of Justice the fingerprint images and related information of  
24 persons with secure access to the electronic recording delivery  
25 system and computer security auditors for the purpose of  
26 obtaining information as to the existence and nature of a record  
27 of state or federal convictions and arrests for which the  
28 Department of Justice establishes that the applicant was released  
29 on bail or on his or her own recognizance pending trial.

30 (2) The Department of Justice shall respond to the Secretary of  
31 State for criminal offender record information requests submitted  
32 pursuant to this section, with information as delineated in  
33 subdivision (l) of Section 11105 of the Penal Code.

34 (3) The Department of Justice shall forward requests from the  
35 Secretary of State to the Federal Bureau of Investigation for  
36 federal summary criminal history information pursuant to this  
37 section.

38 (4) The Secretary of State shall review and compile the  
39 information from the Department of Justice and the Federal  
40 Bureau of Investigation to determine whether a person is eligible

1 to access the electronic recording delivery system pursuant to this  
2 part.

3 (5) The Secretary of State shall request subsequent arrest  
4 notification service, pursuant to Section 11105.2 of the Penal  
5 Code, for all persons with secure access to the electronic  
6 recording delivery system and all computer security auditors.

7 (s) The Secretary of State shall deliver written notification of  
8 an individual's ineligibility for access to the electronic recording  
9 delivery system to the individual, his or her known employer,  
10 and the computer security auditor.

11 (t) The Department of Justice shall charge a fee sufficient to  
12 cover the cost of processing a state or federal criminal offender  
13 record information request and any other costs incurred pursuant  
14 to this section.

15 (u) The Secretary of State shall define "secure access" by  
16 regulation.

17 (v) The Secretary of State shall monitor the security of the  
18 electronic recording delivery system. If an emergency involving  
19 ~~multiple~~ fraudulent transactions occurs, the Secretary of State  
20 may order the suspension of the electronic recording delivery  
21 system, if necessary to protect the security of the system.

22 (w) (1) The Attorney General, a district attorney, or a city  
23 prosecutor may bring an action in the name of the people of the  
24 state seeking declaratory or injunctive relief, restitution for  
25 damages or economic loss, rescission, or other equitable relief  
26 pertaining to any alleged violation of this part or any regulation  
27 adopted pursuant to this part. Injunctive relief may include, but is  
28 not limited to, an order suspending a party from participation in  
29 the electronic recording delivery system, on a temporary or  
30 permanent basis.

31 (2) Nothing in this subdivision shall be construed to prevent  
32 the Attorney General, a district attorney, or a city prosecutor  
33 from seeking legal or equitable relief under any other provision  
34 of law.

35 (x) The Secretary of State shall conduct an evaluation of the  
36 electronic recording delivery system authorized by this part, and  
37 report to the Legislature on or before June 30, 2011.

38 (y) The evaluation required under subdivision (x) shall include  
39 a study of the feasibility of expanding the provisions of this part

1 to cover the delivery, recording, and return of other electronic  
2 records.

3 (z) *The Secretary of State shall place a direct link from the*  
4 *Advance Health Care Directive Registry Internet Web site to the*  
5 *Internet Web site of a repository of electronic advance health*  
6 *care directives, which have been created in accordance with the*  
7 *Probate Code, upon request of the repository. In turn, the*  
8 *repository shall place a direct link to the Advance Health Care*  
9 *Directive Registry Internet Web site on its home page.*

10 (aa) *The Advance Health Care Directive Registry Internet*  
11 *Web site shall have a direct link to “Donate Life,” the California*  
12 *Organ and Tissue Donor Registry Web site, on its home page. In*  
13 *addition, “Donate Life,” the California Organ and Tissue Donor*  
14 *Registry Internet Web site shall have a direct link to the Advance*  
15 *Health Care Directive Registry Internet Web site.*

16 (bb) The authority granted in this part is in addition to any  
17 other authority or obligation under state or federal law.

18 ~~(aa)~~

19 (cc) The Secretary of State shall use existing resources of the  
20 Office of Secretary of State to implement this section.

21 SEC. 2. *Section 4673 of the Probate Code is amended to*  
22 *read:*

23 4673. (a) A written advance health care directive is legally  
24 sufficient if all of the following requirements are satisfied:

25 ~~(a)~~

26 (1) The advance directive contains the date of its execution.

27 ~~(b)~~

28 (2) The advance directive is signed either ~~(1)~~ by the patient or  
29 ~~(2)~~ in the patient’s name by another adult in the patient’s  
30 presence and at the patient’s direction.

31 ~~(c)~~

32 (3) The advance directive is either ~~(1)~~ acknowledged before a  
33 notary public or ~~(2)~~ signed by at least two witnesses who satisfy  
34 the requirements of Sections 4674 and 4675.

35 (b) *An electronic advance health care directive or power of*  
36 *attorney for health care is legally sufficient if the requirements in*  
37 *subdivision (a) are satisfied, including an acknowledgment*  
38 *before a notary public, and if the signatures used are digital and*  
39 *meet all of the following requirements:*



1     *(1) The digital signature either meets the requirements of*  
2     *Section 16.5 of the Government Code and Chapter 10*  
3     *(commencing with Section 22000) of Division 7 of Title 2 of the*  
4     *California Code of Regulations or the digital signature uses an*  
5     *algorithm approved by the National Institute of Standards and*  
6     *Technology.*

7     *(2) The digital signature is unique to the person using it.*

8     *(3) The digital signature is capable of verification.*

9     *(4) The digital signature is under the sole control of the*  
10    *person using it.*

11    *(5) The digital signature is linked to data in such a manner*  
12    *that if the data are changed, the digital signature is invalidated.*

13    *(6) The digital signature persists with the document and not by*  
14    *association in separate files.*

15    *(7) The digital signature is bound to a digital certificate.*

16  
17  
18    CORRECTIONS:

19    Text - Page 8.